

Pepsi-Cola Bottling Company of Fresno and Craig S. Lackey. Case 32-CA-4331

3 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 17 February 1983 Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

The judge found that the Respondent, by laying off employee Craig S. Lackey on 1 February 1982, violated Section 8(a)(3) and (1) of the Act. We disagree.

As more fully described by the judge the chronology of events that gave rise to Lackey's layoff is as follows: Lackey was employed by the Respondent as a truck route salesman. Central Valley Beverage Union Local No. 1 represents the Respondent's 90 to 100 union employees, including the truck route salesmen, and began negotiating a new contract with the Respondent during the summer of 1981. Because of Lackey's expressions of dissatisfaction with the collective-bargaining sessions, the Respondent and the Union invited him to attend the last negotiating session on 20 August 1981.² At the meeting Lackey complained about the Respondent's wage system based on incentive and asserted that he would rather work fewer hours for higher hourly wages even if it resulted in lower annual wages than could be earned under the Respondent's incentive system. The Respondent's vice president of sales and marketing, Harmon Morell, advocated the Respondent's work philosophy based on incentive. Neither Morell nor Lackey was persuaded to adopt each other's views. Shortly thereafter, the unit employees ratified the contract agreed to by the parties which, inter alia, retained the incentive system.

¹ No exceptions were taken to the judge's recommended dismissal of the complaint allegations relating to the reassignment, layoff, and refusal to recall employee Frank Martinez.

² All dates herein are in 1981 unless otherwise noted.

On 19 November Lackey was elected union president. By letter dated 20 November the Union informed the Respondent of the election results.

On 21 December Lackey returned to the plant after completing his route and was told to report to the office. There his supervisor, Burris, and route sales coordinator, Donald Smith, discussed certain deficiencies Smith had discovered while running Lackey's route during the latter's vacation.³ Lackey protested the criticisms of his work, but Burris prepared a corrective interview report which listed Lackey's work deficiencies as dirty or unorganized sections, poor rotations, sloppy route book, and failure to check out at 8 a.m. Burris gave Lackey a copy of the corrective interview report, but Lackey refused to sign it.

On 23 December Burris accompanied Lackey on his route. Burris' report of the trip lists several deficiencies and rates Lackey's overall performance as fair.⁴

Because of illness on 5 and 6 January 1982 Lackey did not work. Instead, route sales coordinator Chuck Hinslea ran Lackey's route and subsequently rated the route. Hinslea listed several of the same deficiencies mentioned previously on the route; however, the overall performance rating for 5 January was "commendable" and for 6 January was "needs improvement."

On 12 January 1982 Smith accompanied Lackey on his route. The overall performance rating was "commendable"; however, it also contained several deficiencies. One of the recurring deficiencies listed was Lackey's failure to check out by 8 a.m. On 28 January 1982 Lackey and other union representatives met with management for their first postelection meeting and discussed seniority and medical matters. On 1 February 1982 Lackey and employee Roland Hill were laid off. Lackey's termination slip states that he was laid off for lack of work and that he was eligible for rehire.

The General Counsel contends that Lackey was laid off because he became president of the Union and because of his activity on behalf of the Union. The Respondent argues that the layoff was a business necessity and that it customarily lays off the poorest work performers during the slack season.

The judge found that Lackey was less than an "exemplary route salesman" in that he admitted he was frequently late leaving the plant in the morning, and took 8 or 9 hours to complete a route which was completed by a route sales coordinator

³ Smith indicated deficiencies in product rotation, beverage section cleanliness, and route organization. He also rated Lackey's work performance as fair.

⁴ Rates for review, from top to bottom, are distinguished, superior, commendable, fair, and needs improvement.

in 3 hours, even though the coordinator was a stranger to the route. The judge further found that the December and January route reports setting forth Lackey's deficiencies were routine and were not exaggerated in order to justify his layoff. He determined that there was no evidence that Lackey's supervisor or the two coordinators who had prepared written reports on Lackey were out to get him or had been instructed to do so.

Nevertheless, the judge concluded that Lackey's layoff violated Section 8(a)(3) and (1) of the Act because there was evidence of animus and the Respondent's justification for the layoff did not conform to the record or commonsense. In this connection, he found that the Respondent fundamentally disagreed with Lackey's views toward incentives and would be apprehensive about Lackey's assumption of the union presidency where he could challenge the Respondent's relationship with its work force. The judge noted it was only after Lackey publicly opposed the Respondent's business philosophy and became president of the Union that serious problems began to develop with his work. He found that it was only after 20 August 1981 that a written record was made of Lackey's work deficiencies despite the fact that he had been regularly employed since March 1977. This warranted, he concluded, the inference that the written record commencing in late 1981 was an attempt to build a case against Lackey. Finally, the judge found that, even assuming Lackey had a poor work record during all his employment, he was kept on the payroll through all previous layoffs and was laid off only after his union activity.

Contrary to the judge, we find that the Respondent's layoff of Lackey did not violate Section 8(a)(3) and (1) of the Act. It is well settled that an employee may be dismissed for any reason, or no reason at all, so long as union activity is not the basis for the discharge.⁵

In this case there is insufficient evidence to establish discriminatory motivation.⁶ Lackey's principal union activity, opposition to the recently negotiated collective-bargaining agreement, occurred prior to his election to the union presidency and was ineffective since the employees ratified the contract without his desired changes. It is speculative, at best, to conclude that the Respondent laid off Lackey out of concern about the incentive issue

when the term of the recently negotiated contract was for 3 years and Lackey might not be president at the expiration of the contract.

Nor do the Respondent's proffered reasons for the layoff warrant an inference of unlawful motivation. As the judge readily concedes, Lackey was less than an outstanding employee who had been talked to on many occasions about his deficiencies. Contrary to the judge, the record indicates, and Lackey admitted, that he had been given other unfavorable reports concerning his work which predated his union activities. Furthermore, as the judge found, the January written reports were routine and there is no evidence that Lackey's appraisers were out to get him or had been instructed to do so. Given these findings, there is insufficient basis for the judge's finding that the inference is warranted that the written record in late 1981 was an attempt to build a case against Lackey.

In view of the insufficient evidence of animus, Lackey's unfavorable reports before his union activities, and his poor performance in January, we conclude that the Respondent established that it would have laid off Lackey regardless of his union activity.

On the basis of the foregoing, we find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by laying off employee Lackey and we shall therefore dismiss this portion of the complaint.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in Fresno, California, on November 17 and 18, 1982.¹ The complaint,² issued May 28, is based on a charge filed March 12 and a first amended charge filed March 12 by Craig Lackey,³ an individual. The complaint alleges that Pepsi-Cola Bottling Company of Fresno (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record,⁴ and from my observation of the witnesses and their demeanor, I make the following

⁵ *Lawson Milk Co. v. NLRB*, 317 F.2d 756, 760 (6th Cir. 1963); *Auto-Track Federal Credit Union*, 232 NLRB 1024, 1027 (1977).

⁶ In this connection we note that the judge did not credit Lackey's testimony that, after he became active in the Union, his supervisor, Harold Boniface, stopped being friendly toward him. The judge also failed to credit Lackey's assertion that Morell stated that possibly Lackey was working at the wrong place and offered to arrange an interview for Lackey at Coca-Cola or that Lackey's statements regarding the job were placing in jeopardy his job and those of other employees.

¹ All dates hereinafter are within 1982, unless stated to be otherwise.

² The complaint was amended as heard, to correct erroneous dates and a misspelled name (LeCompte).

³ Individuals are referred to herein by their last names.

⁴ Respondent's motion to correct transcript was not opposed by the General Counsel, and is granted. Respondent's motion in its brief to strike certain accepted testimony is denied.

FINDINGS OF FACT

I. JURISDICTION

At all times material herein Respondent, a Delaware corporation with a place of business in Fresno, California, has been engaged in the manufacture and sale of carbonated soft drink beverages. During the past 12 months Respondent, in the course and conduct of its business operations, purchased and received goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California.

Respondent admits, and I find, that Respondent is, and at all times relevant herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Central Valley Beverage Union, Local No. 1 (the Union) is, and at all times relevant herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background⁵

Respondent is the Fresno facility of Pepsi-Cola Bottling Company, and has a sales force of approximately 35 to 40. The number of Respondent's employees varies with the seasons, with June, July, and August being the busiest months and January and February being the least busy. Harmon Morell is Respondent's vice president of sales and marketing; Maurice Talbot is sales manager; Kenneth Burris is route sales supervisor;⁶ Stan Proctor is operations manager; Harold Boniface is night loading supervisor; Chuck LeCompte was, at times relevant herein, a lead truckloader on the night shift; Donald Smith is route sales coordinator;⁷ and Kathy Seiler is director of personnel and administrative services.

Respondent's operations involved in this dispute are those of truck route deliveries of Respondent's products to stores and other customers in and near Fresno, and the loading of trucks for use by all drivers. Truck salesmen submit each day to Boniface's department load sheets that describe the products the salesmen need for

the following day's deliveries. That evening, employees in Boniface's department load the requested products on the trucks, and prepare the trucks for use the following morning. Truck salesmen are under instructions to check out of the gate by 8 a.m. each day. Each salesman has one or more routes, which he drives on a rotational basis. Each salesman keeps a route book in his truck, in which he records pertinent information relative to his route and customers, including parking information and special instructions relating to customer requirements and peculiarities. Route books are supposed to be written in pencil, in order to facilitate changes as customers or their instructions change. Salesmen are responsible for keeping coolers, shelves, and "back room" storage areas used for Respondent's products clean and orderly; for rotating products on a regular basis, in order to move the oldest products out prior to the newest ones being sold; for assisting in special promotions and sales; for seeing that displays and advertising signs are in proper location and order; and for related tasks. Salesmen are paid a basic wage, plus a commission on products they sell. Their hours of work are not limited, and they are not paid overtime. They may work as long each day as they like, and by working lengthy shifts, they are able to earn substantial amounts of commissions.

Central Valley Beverage Union Local No. 1 is an independent Union which represents Respondent's 90 to 100 union employees, including the truck route salesmen and some others. In the summer of 1981 Respondent and the Union were negotiating a new contract, with Morell principally representing Respondent and Joe Reina principally representing the Union. Several bargaining sessions were held, and during the negotiating period the Union held its own meetings with unit employees. At two of the union meetings, Lackey objected to several of Respondent's proposals and expressed particular displeasure with Respondent's method of payment of wages.

The last negotiation session was held by Respondent and the Union on August 20, 1981. Prior to that session some of the Union's board members had told Morell about Lackey's expressions of dissatisfaction with the Union and Respondent's proposals, and suggested that Lackey be invited to a negotiation session. Morell agreed, and Lackey was invited to attend the session of August 20. Lackey arrived quite late, accompanied by two fellow route salesmen. Lackey was given an opportunity to express his views. His principal complaint was that he had to work too hard in order to make the money he did. He said that although he made \$3,000 or \$4,000 more each year at Respondent's business than he would make at Coca-Cola he had to work 60 to 70 hours each week to do so. Morell explained Respondent's philosophy as being one based on incentive, and Lackey explained that he considered higher hourly earnings under a Coca-Cola-type contract to be his principal desire, rather than high total yearly earnings. He said he preferred an arrangement such as that at Coca-Cola, even though such an arrangement would mean lower total earnings. Coca-Cola paid a lower commission on sales than did Respondent, and rarely permitted any overtime, but it paid higher hourly wages than Respondent. Morell

⁵ This background summary is based on stipulations of counsel, and on testimony and evidence not in dispute.

⁶ This title formerly was known as district manager.

⁷ This title formerly was known as specialty salesman. The General Counsel alleged, and Respondent denied, that Smith and LeCompte are supervisors or agents within the meaning of the Act. Smith is one of several route sales coordinators, who generally do rank-and-file work but who run routes for route salesmen that are on vacation or otherwise are off work. Route sales coordinators file written reports on the condition of routes they run for others, and train route salesmen as required. They had no authority to hire or fire, discipline, direct the work of or otherwise supervise employees, or to recommend any such actions. LeCompte was supervised by Boniface, and generally did rank-and-file work as a loader. The record does not show that LeCompte had or exercised any authority other than as a leadman. LeCompte sometimes acted for Burris when the latter was on vacation or off work, and sometimes witnessed formal employee actions taken by Boniface, but he was a union member, attended union meetings, and voted in union elections. It is found that neither Smith nor LeCompte is a supervisor or agent within the meaning of the Act. The supervisory status of Morell, Talbot, Burris, Proctor, and Seiler is not in dispute.

told Lackey that Respondent had a competitive advantage by reason of its employment based on incentive and industriousness, and that he did not want to be "saddled" with a contract primarily based on hourly wages, such as the contract under which Respondent's principal competitors, including Coca-Cola, worked. The meeting ended with neither Morell nor Lackey persuaded to adopt the other's views. Approximately a week after the final negotiation session, the unit employees ratified the contract agreed to by the negotiators.

On November 19 the Union held an election of officers, and Lackey was elected union president. By letter dated November 20, the Union informed Respondent of the election results and listed the names of all five new officers, including Lackey.

In mid-December Lackey was on vacation 1 week, returning to work December 21. On December 22 Frank Martinez, who had worked in the night loading department since January 1979, was discharged.⁸ Martinez had been the subject of a long list of adverse comments by his supervisors, corrective interviews, oral and written warnings, and file notations concerning his work performance. Those matters are discussed in detail, *infra*. Martinez talked with Lackey and asked what he should do about his layoff, which he protested. Lackey said he would have to see Martinez' personnel file, and Martinez gave him an authorization slip to pick up the file. Lackey briefly talked with Morell about Martinez' discharge, and Morell said the discharge was the responsibility of Martinez' supervisor (Boniface), with whom Morell would not interfere. Lackey asked to see Martinez' personnel file, and Morell said the file was kept by the personnel department (Seiler), with whom Lackey would have to deal.⁹ Martinez never was reinstated by Respondent, and the General Counsel alleges that his layoff was in violation of the Act.

After his route was completed on December 22, 1981, Lackey was called into the office where Burris, his supervisor, and Smith talked with him. Smith had run Lackey's route during the latter's vacation and had submitted a route report to Burris and Talbot.¹⁰ The report lists deficiencies in product rotation, beverage section cleanliness, route organization, and product rotation in stores. Smith concluded "once again overall job is fair. Craig is well liked, gets the ads and displays; but we need to work on the total job which includes all accounts." The three men discussed Smith's route report, and Lackey protested that there were good reasons for everything he did on the route, and that no criticism of his work was justified. Burris prepared a corrective interview, which listed Lackey's work deficiencies as

dirty or unorganized warm sections, poor rotations, sloppy route book, and failure to check out at 8 a.m.¹¹ Burris gave a copy of the corrective interview report to Lackey, which Lackey objected to and refused to sign.

On December 23, as a result of the corrective interview of December 22, Burris rode with Lackey on his route. Burris' trip report lists several deficiencies and shows Lackey's overall performance review as "fair."¹²

On January 5 and 6 Lackey was off work because of illness, and his route was run by Chuck Hinslea, a route sales coordinator the same as Smith. Hinslea prepared trip reports for both days, with the principal deficiencies shown as failure to maintain complete and accurate records, failure to carry complete stock on the truck and shelves, inadequate shelf cleanliness, poor rotation of stock, and failure to properly maintain displays. The overall performance rating of January 5 was "commendable"; that of January 6 was "Needs Improvement."

On January 12 Smith again rode Lackey's route with Lackey,¹³ and prepared a trip report dated January 12. The report¹⁴ shows several deficiencies, shows "great improvement on backrooms," shows overall performance as "commendable" and states that Lackey needs to work on checking out of the gate before 8 a.m., and needs to improve on recordkeeping. The report states "Craig is liked everywhere. Does a good job selling promotions . . . Excellent improvement over last time."

On January 28 Lackey and other union representatives met with Morell and other management representatives in the first postelection meeting following the Union's election of its new slate of officers. They discussed, *inter alia*, seniority and medical matters.

Lackey was laid off on February 1. Another employee, Roland Hill, was laid off at the same time. Lackey's employment release form states under "Reason for Termination," "Lack of work." It also states "Eligible for Rehire," "Yes." The General Counsel alleges that Lackey was laid off because of his becoming president of the Union, and because of his union activity. Respondent contends that a layoff was necessary; that Respondent customarily lays off employees during the slack season; that Respondent customarily lays off its poorest work performers; and that Lackey was laid off solely for business reasons, unrelated to his union activity.

A. Lackey's Layoff

1. Lackey's union activity

Lackey first went to work for Respondent in March 1977, and became a route salesman in July 1978. Lackey credibly testified that he did not attend any union meetings until June 1981, and that he was quite vociferous once he began to attend meetings. He said he did not

⁸ Martinez' release by Respondent sometimes was referred to as a layoff, and sometimes as a discharge.

⁹ Lackey, Morell, and Seiler testified at some length relative to Lackey's efforts to obtain Martinez' personnel file. Lackey inferred that Respondent somehow refused to cooperate with him in this matter, and Morell and Seiler testified differently from Lackey. None of the three witnesses is given full credit on this subject. The testimony has been carefully considered, and is given no weight. Resolution of these testimonial discrepancies is not necessary, since such resolution would not affect any finding or conclusion herein.

¹⁰ G.C. Exh. 2. There is no dispute concerning the fact that preparation of such reports is routine when a route sales coordinator (such as Smith) temporarily runs a salesman's route.

¹¹ G.C. Exh. 3.

¹² Resp. Exh. 2. Rates for review are, from top to bottom, distinguished, superior, commendable, fair, and needs improvement.

¹³ Lackey testified this was a "surprise trip" of which he had no prior notice. Smith testified that although he did not know for sure whether or not Lackey was notified of this trip in advance such trips are customary, and that salesmen are notified of them in advance. Resolution of this discrepancy is not necessary, and is not made.

¹⁴ Resp. Exh. 5.

agree with Respondent's business philosophy, and pushed hard for a contract based on an hourly wage rather than an incentive commission—wage basis.¹⁵ As previously noted, Lackey confronted Morell on August 20, 1981, at the last negotiation session concerning his philosophy of work, his opposition to the Union's position, and his desire to have a contract based on his philosophy rather than the one expressed by Respondent and the Union. It is clear that the confrontation was not a congenial one, and that Morell was annoyed with Lackey's opposition, particularly since Lackey became an antagonist quite late in the day, after negotiations already were well along toward completion. It is equally clear that Morell worked well with the Union and its leadership, and that his annoyance was with Lackey personally, rather than with the Union as an organization of unit employees.¹⁶

Lackey testified that Martinez told him that Boniface and LeCompte said Harmon was mad at Martinez because the latter had nominated Lackey for union president. Martinez testified that he had nominated Lackey for union president, and that LeCompte was present at the union meeting when Martinez made the nomination. There were two other nominations for union president. Martinez further testified that LeCompte told him that Boniface was mad because he heard of Lackey's nomination by Martinez, and that Boniface told him Morell had heard about the nomination and was upset about it. LeCompte denied this testimony by Martinez. Boniface also denied Martinez' testimony on this point, and testified that he considered Lackey his friend, and did not care who nominated Lackey. Boniface said he first learned who had nominated Lackey a couple of days after the nomination, when Martinez told him and LeCompte about it. Morell did not testify relative to his matter. The General Counsel alleges that LeCompte created the impression of surveillance of employees' union activity when he made the statement attributed to him by Martinez, in violation of Section 8(a)(1) of the Act, but the record does not support that allegation. As found above, LeCompte was not a supervisor or agent within the meaning of the Act. In any event, the testimony of LeCompte and Boniface is credited over that of Martinez. Both LeCompte and Boniface were impressive witnesses, and it seemed highly unlikely that they would have been concerned with Lackey's nomination, or that Morell would have talked with them about that subject, as discussed below. LeCompte and Boniface had worked for a long time in protecting Martinez, who was a poor employee frequently involved in mistakes and work incidents. Martinez' testimony on this issue is given no credence. However, that conclusion does not alter the fact that Respondent was displeased with Lackey's opposition to the union contract, and it is clear that Respondent would not be overjoyed with Lackey's selection as union president. Whether or not those facts would affect Lackey's employment with Respondent is a different question, discussed below.

2. Lackey's work performance

Lackey contends that his work was excellent, and that there is good reason for each deficiency attributed to him. Respondent contends that Lackey was, overall, one of the weakest salesmen on the force, and that he refused to accept criticism, and often contradicted Respondent's work philosophy and work direction. It appears that the truth lies somewhere between the two positions.

Based on observation of the witnesses and after hearing their testimony, it is clear that Lackey is argumentative, defensive, and somewhat evasive as Respondent contends. He has an excuse for each criticism of his work. However, Morell's philosophy of work is quite different from that of Lackey, and it is apparent that Morell would like to see Lackey off the payroll. Without union affiliation Respondent could isolate Lackey and generally pay little attention to his desire for an easier job at the same or nearly the same pay. With Lackey as the union president, a different picture emerges. Lackey then would be able to press his work philosophy from a position of some strength.

The fact that Lackey was less than an exemplary route salesman is quite clear. In addition to his defensiveness, the reports prepared by Burris, Smith, and Hinslea show that Lackey was deficient in several areas of his responsibility. Frequently, as Lackey acknowledged, he was late leaving the plant in the morning; admittedly, he sometimes challenged Respondent's policies and work goals when talking with supervisors; admittedly, the route that he ran in 8 or 9 hours only required 3 hours of Hinslea's time, even though Hinslea was a stranger to the route. Burris, Smith, and Hinslea reported in writing several of Lackey's work deficiencies. The fact that Lackey had excuses for all those things does not alter the fact that they did occur. The General Counsel argues that Burris, Smith, and Hinslea exaggerated their reports in order to justify Lackey's layoff, but the three men credibly denied that contention. Smith and Hinslea were not supervisors, but assuming arguendo that they were, the facts remain that all the reports were routine and in the ordinary course of business; there is no evidence that any of the three were out to get Lackey or had been instructed to do so; and Lackey was interviewed after each report was made with full opportunity to challenge the reports.

Morell testified that he was not personally familiar with Lackey's work, but that he was aware of it, and that, although there were new hires, transfers, and recalls after Lackey was laid off, Lackey was not recalled because of his poor work performance.

Burris, Hinslea, and Smith testified at length and in detail concerning their personal observations of Lackey's route. They corroborated their own written reports, and all of them added that there were some deficiencies in Lackey's route that they talked with him about, but did not include in their written reviews. Hinslea testified that the things he found wrong on Lackey's route exceeded in number and severity the things he found wrong on the routes of other salesmen he had run in the past. Smith

¹⁵ Lackey credibly testified that employees customarily were permitted to attend union meetings during work hours.

¹⁶ Lackey testified that Boniface formerly was friendly with him, but that the friendliness disappeared after Lackey became active in the Union. Boniface testified that he was not interested in Lackey's union activity, and denied that he ever had anything against Lackey. Boniface was a substantially more credible witness than Lackey, and his denial of Lackey's testimony on this point is credited.

testified in much the same manner, and stated that he graded most routes he had run, in the "commendable" range. Burris testified in the same manner, and stated that Lackey sometimes resisted his instructions, particularly in the matter of giving promotional discounts to customers.

It is found that Lackey was not a top work performer; that his route was, as noted by Smith, only "commendable"; and that he had been talked with concerning his deficiencies on many occasions by Supervisor Burris. Respondent acknowledges that Lackey was well liked by his customers, and that he did a good job in some respects.

3. Respondent's animus

As noted above, the relationship between Respondent and the Union generally was an amicable one. There is nothing in the record to show union animus on the part of Respondent. There was no attempt by Respondent, so far as the record shows, to rid itself of the Union. Boniface appeared to be particularly sympathetic with the employees' union activity, and gave them time off to attend union meetings.

However, also as noted above, it is clear that Respondent disagreed in a fundamental and serious manner with Lackey's personal views toward work, and that Respondent naturally would be apprehensive concerning Lackey's assumption of the union presidency, wherein he could challenge Respondent's relationship with its work force. Lackey's strong views directly contradicted, and went straight to the heart of, Respondent's work concept. Respondent's concern is understandable, but the question remains as to whether Lackey was laid off, wholly or partially, because of his unsatisfactory work performance or because of his union position, or both. Lackey had been elected president by the union members, and when he spoke as president he spoke for the membership, not as just a single employee.¹⁷

4. Lackey's layoff

The contract between Respondent and the Union provides, *inter alia*:

ARTICLE III SENIORITY:

In all cases involving an increase or decrease of forces, or transfer, the Company will consider the following factors, and where factors (B) and (C) are relatively equal, length of continuous service with the Company (Factor A) shall govern.

A. Length of continuous service with the Company.

B. Knowledge, training, ability to perform the job, skill, and efficiency.

C. Physical ability to perform the job duties as determined by a physician.

The Company will have sole discretion in the determination of an employee's qualification under factor (B) above.

Seniority shall be defined for the purpose of this Agreement to mean continuous employment by the Company beginning with the date on which the employee began to work after last being hired, less deductions of time lost in excess of three (3) months in any period of twelve (12) consecutive months due to sickness, injury, or layoff.

Lackey testified that after he finished his route on February 1 he met with Burris, Hinslea, and Smith. Burris said work was slow, layoffs were necessary; "white-shirts" may have to go back on the routes; top management had instructed each division manager to select one person for layoff; and that Lackey had been selected from Burris' division because he "had a bad attitude lately" and was difficult to work with. Lackey would be recalled when business improved. Burris said transfer to another division was not possible because those that were to be transferred to a new plant that was being opened up already had been selected. In the past, approximately one person in each of Respondent's five divisions were laid off during the winter season. Layoffs usually are completed by November 1. Generally, Respondent's practice is to lay off the least productive employees. Lackey said he knows of no policy or contract provision relative to recall of laid-off employees.

Morell testified that layoffs occur every year and are anticipated in Respondent's yearly budgets. The budget for 1981-1982 anticipated the layoff of two route salesmen,¹⁸ to a total of 36. However, business was unusually poor in 1981-1982 and additional layoffs were decided upon. Two routes in Fresno were eliminated, hence there were 35 salespersons in January¹⁹ and 32 in February. The number increased in March, but it still was below the budget figure, as it was throughout 1982 until September, when it was increased to normal in anticipation of the holidays. The decision to reduce the number of all employees, including salesmen, was made by management in January, after which Morell instructed department managers to start thinking about layoffs. He instructed Claude Butler, Respondent's operations manager, to lay off two route salesmen in January. Those to be laid off were to be anyone Butler selected—Morell left that decision to Butler. A couple of days later Burris advised Morell that Roland Hill and Lackey were selected in his department. Morell questioned the selection of Lackey because of Lackey's union position, and Burris assured him that the sole reason for Lackey's selection was the latter's poor work record. Morell and Burris checked Lackey's personnel file, and verified his poor record. Lackey and Hill were laid off the same day be-

¹⁷ Lackey testified that during the last negotiation session on August 20 Morell stated that possibly Lackey was working at the wrong place, and offered to arrange an interview for him, with a Coca-Cola representative; further, that Morell stated that Lackey's misinformation was placing in jeopardy the jobs of Lackey and other employees. Morell denied that testimony. Morell was a more convincing witness than Lackey, and his denial is credited.

¹⁸ See Resp. Exh. 8.

¹⁹ The drop from 36 to 35 was occasioned by the maternity leave of Linda Brown. The drop from 38 in October 1981 to 36 in December 1981 was occasioned by the transfer of John Kellett to the warehouse, and one voluntary quit.

cause they were the weakest employees in the route sales department. Throughout the layoff customary policy and practice were followed. Lackey was not recalled because of his poor work performance; recall customarily is based on work performance. Darryl Vail had been hired November 2 upon recommendation from a bottler in Iowa, and was laid off in late December because his hire had been premature in view of the drop in business. Vail was rehired on February 9 or 12, a week or so after Lackey was laid off. During that week Jim Peters quit, and Vail was rehired rather than Lackey because Vail was a better employee. Danny Wynn was on disability leave in February and was terminated in March. Employees Allison and Decker were transferred into the sales department in March, and two new employees, Poor and Keck, were hired.

Butler testified that Morell talked with him about the proposed layoffs after a staff meeting Morell attended. He instructed Butler to lay off two employees in the sales department. Butler spoke with all the district managers, and told them to select their two weakest employees. Burris later reported the two selectees as Lackey and Hill. That decision was questioned by Butler because he knew of Lackey's union activity, but Burris assured him the decision was based solely on work performance. Butler advised Morell of the decision, and assured him that it was based solely on the work records of Lackey and Hill.

Burris corroborated the testimony of Morell and Butler relative to this matter, and testified concerning the exact method of selection of Lackey and Hill. He said that in discussing employees their good qualities were discussed as well as their poor qualities, and that the district managers were unanimous in their selection of Lackey and Hill. This was the first time Burris said that he had attended such a meeting of managers to select employees for layoff because in the past the poor performers were obvious, and there were not so many people involved in the layoffs. Burris took over supervision of the division in January 1981.

Discussion

As discussed above, Lackey was not an outstanding employee, and his testimony that he was a top performer was glib and unconvincing. However, Respondent's explanation of Lackey's layoff simply does not conform with the record or with commonsense.

Clearly, Respondent would not be enthusiastic about having Lackey on the payroll after his views became known on August 20, 1981, and even more, after he became union president on November 9, 1981. Respondent is a keen competitor, and its employees' pay system was designed to keep it competitive. Lackey vociferously was opposed to that system.

Lackey had been employed by Respondent since March 1977 and had been a route salesman since July 1978. There have been annual seasonal fluctuations in the number of salesmen over the years, and there have been other variations caused by quits, transfers, and other reasons. Yet, Lackey survived all those many changes. He did not publicly oppose Respondent's business philosophy, so far as the record shows, until August 20, 1981,

and the only record of his corrective interviews commenced after that date, so far as this controversy is concerned. The conclusion is all but unavoidable that Lackey was not in serious trouble with Respondent until after August 20, 1981.²⁰

Lackey testified that prior to the corrective interviews of late 1981 and early 1982 his route reports had been good to excellent, although there were occasional criticisms. His most recent employee appraisal, dated June 1981, and signed by Burris, Talbot, and Hellbush from management, lists Lackey's strong and weak points and concludes that his overall performance was "good" on a scale reading from top to bottom, "outstanding," "very good," "good," "marginal," and "unsatisfactory." Burris testified that Lackey was a problem employee continuously from the time Burris took over the division in January 1981, and that he had talked with Lackey about his problems on many occasions. It is clear that Lackey had several deficiencies as an employee, but it is equally clear that those deficiencies were not so serious that they resulted in a written record until after Lackey aired his views of Respondent's work philosophy. The suspicion is strong, and the inference is warranted, that the written record commencing in late 1981 was an attempt to build a case against Lackey.

Morell went to considerable length in explaining the various layoffs of employees in 1981 and 1982, but he did not explain why, if Lackey was not a good employee, he was not laid off in prior years, or even early in the slack season of 1981. Morell mentioned in his testimony that the record on Lackey supported his layoff as a legitimate business matter, but that record consists of documents compiled after Lackey became union president.

Assuming that Lackey had a poor work record during all his employment, he was kept on the payroll year after year and was laid off without recall only after his union activity commenced. So far as the record shows, but for his union activity he still would be on the payroll. His performance appraisal of June 15, 1981, is not greatly different from his route reports of December 1981 and January 1982. So far as the record shows, nothing changed between June 1981 and January 1982, other than his union activity.

It is found that Lackey was discharged because of his union and related activity, in violation of Section 8(a)(3) and (1) of the Act, as alleged.²¹

B. Martinez' Layoff

Martinez worked in the night loading division, under the supervision of Boniface. Boniface is responsible for seeing that the trucks properly are loaded at night, according to load sheets prepared by route salesmen, for use the following morning. There are several different work positions in the department, and Boniface attempts

²⁰ Some trial time was devoted to an alleged incident wherein Morell and Burris were said to have admonished employees to quit griping to customers about the contract signed by Respondent and the Union. Morell and Burris denied the incident. All that testimony has been carefully considered, and is given no weight. Any credibility resolutions relative to the incident would not affect any finding or conclusion herein.

²¹ *Wright Line*, 251 NLRB 1083 (1980).

to rotate each employee each week, among those positions. The positions are driver, glass man, flavor man (two), forklift driver (two), and checker (one or two). Prior to January 1982 there also was the position of truck fueler; the position was abolished when the function was given to the fleet department. As with the rest of the plant, personnel of the night loading department varies with the season. Employees are notified when they are hired that the work varies with the season, and when layoffs occur, seniority is considered secondarily—work quality of employee is the first consideration.

Martinez' work record with Respondent was very poor. Much of that record is contained in Respondent's Exhibit No. 7. Included are the following documents and notations:

7-9-80	Oral Discipline	Work not satisfactory
8-8-80	Performance Appraisal	Several deficiencies noted. Rating "good"
8-6-80	Leadman Memo to Boniface	Work unsatisfactory
8-11-80	Memo	Late to work
8-18-80	Note by Leadman	Loafing
9-9-80	Verbal Warning by Boniface	Quit work early
9-10-80	Corrective Interview by Boniface	Quit work early
9-9-80	Note by Boniface	Late from lunch
10-10-80	Boniface Memo to Operations Mgr.	Police problem
12-12-80	Memo	Late to work
12-16-80	Memo	Late to work
1-23-81	Corrective Interview by Boniface	Late to work
1-30-81	Boniface Note	Broke fuel nozzle
2-2-81	Boniface Note	Broke fuel nozzle
2-13-81	Note, LeCompte to Boniface	Work unsatisfactory
2-17-81	Boniface Note	Work unsatisfactory
2-17-81	Corrective Interview by Boniface	Truck accident—property damage
3-19-81	Corrective Interview by Boniface	Truck accident
5-2-81	Note by Boniface	Work unsatisfactory—Poor work with others
12-17-81	Corrective Interview by Boniface	Disobeyed orders

Martinez acknowledged many of the incidents listed above, and testified in such a manner that it was obvious he was not a satisfactory employee. He offered only a few excuses for the many instances wherein he was warned or disciplined.

Boniface and LeCompte corroborated the list set out above, and added some instances of Martinez' unsatisfactory work which were not reduced to writing.

The 1981-1982 seasonal layoff in Boniface's department commenced on October 5, 1981, when Marty Staneart was laid off. A second layoff became necessary and Ron Garcia volunteered for it because he was going to school and had found that his job was interfering with his edu-

cation. Garcia was laid off, at his own request, on December 11, 1981. A third layoff became necessary and Martinez was laid off December 21, 1981. His release paper read that he was terminated "Due to Lack of Work"; the "Eligible for Rehire" column was not checked, either for "yes" or "no."

Martinez testified that when he was laid off, Boniface said he was having to do something he did not like to do. Boniface did not reply when Martinez asked about possible recall. Martinez asked "why me" and Boniface replied "don't argue with me." Boniface was upset and said he was just following orders.

LeCompte testified that he talked with Boniface about Martinez' layoff, and that Boniface was upset about having to lay him off because he did not want to do so. Boniface said a layoff was necessary due to slack work, and Martinez was the weakest employee left. LeCompte said Martinez asked about possible recall and Boniface replied that he did not want to give him an answer at that time. LeCompte said he did not hear Martinez ask why it was he who was being laid off nor did he hear Boniface tell Martinez not to argue with him.

Boniface testified that he did not want to lay off Martinez, but had to do so because of lack of work; he selected Martinez because of the latter's poor work record. He said Martinez asked why it had to be him, and Boniface replied that his mind was made up and he did not want to argue about it. He told Martinez he could not then tell him whether or not he would be recalled.

Discussion

In view of the fact that Martinez was such a poor employee, the principal question is why Respondent held on to him as long as it did. Part of the answer is found in Respondent's Exhibits 7(1), (m), and (n). Respondent's Exhibit 7(n) was signed, approximately October 10, 1980, by the then operations manager of Respondent, Marvin Wilkerson, and refers to an earlier robbery conviction of Martinez, concerning which Martinez lied to Respondent. Wilkerson stated, inter alia:

On viewing all of the facts in the case, even though Frank lied to us twice, realizing that he was on a furlough program and in jail, we decided that if we did terminate his employment, he would go back to jail and finish out his sentence which is up in November and we might be contributing more so to a social problem that he may have in the future and this being his first offense, we thought we would give him another chance to prove himself.

A warning has been written up in detail and Frank has signed the warning stating that if any indication of any use of drugs, theft, or lying were found he would be terminated immediately.

The rest of the answer is found in the continuing desire of Respondent, and of Boniface, to assist Martinez all they could. Boniface was a considerate, thoughtful supervisor who worked closely and amicably with the employees he supervised. That fact was attested by nearly all witnesses, including Martinez. Boniface ate with the employees, counseled with them, and assisted them. He

gave employees time off to go to union meetings, and the employees brought him lunch after the meetings. Martinez acknowledged that Boniface was protective of him, and gave him breaks and the benefit of doubts. Clearly, Respondent was not trying to get rid of Martinez.

Martinez had survived earlier layoffs, and the General Counsel argues that he was laid off in December because he had nominated Lackey for union president. As found above, the record does not support that conclusion. Burris credibly denied that contention, and it is clear that Martinez was retained until it no longer was feasible to keep him on the payroll. Had Respondent wanted to rid itself of Martinez, it easily could have done so at the time of the layoff of Steaneart or, later, Garcia. The fact that layoffs were necessary, credibly was testified to by Morell and Boniface. The fact that Martinez was the last, rather than the first or second, to go lends credence to Boniface's testimony that he was reluctant to let Martinez go, and retained him as long as he could.

It is found that Martinez was laid off, and not recalled to work solely because of economic reasons unrelated to Martinez' union or other protected activity.

Paragraph 7(a) of the complaint alleges that in late November 1981 Respondent reassigned Martinez to a less desirable job because of his protected activity. That allegation is found to be without merit.

Martinez testified that in early December he worked in glass for 2 weeks rather than for the usual 1-week rotational period. The General Counsel argues that working in glass was more onerous than any of the other work duties in the night loading division, but that argument is a conclusion not supported by testimony or evidence. In any event, Boniface credibly testified that, although he did not remember the incident and possibly he did leave Martinez in glass 2 weeks instead of 1 week, if he did so, it was not to punish Martinez—to the contrary, he did everything he could to protect and assist Martinez. That testimony has the support of the record. Finally, the record does not show that the 1-week rotation system inexorably was followed, without deviation.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with their operations de-

scribed in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent be ordered to offer immediate and full reinstatement of Craig S. Lackey to his former job, or if that job no longer exists, to a substantially equivalent job, without loss of seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On the basis of the above finding of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Pepsi-Cola Bottling Company of Fresno is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Central Valley Beverage Union, Local No. 1 is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by laying off an employee because of that employee's protected activity.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]